IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.06.2006

CORAM

THE HON'BLE MR. JUSTICE N. PAUL VASANTHAKUMAR

W.P.No.5480 of 1998

M.Pankajam ... Petitioner

vs

1. State of Tamil Nadu Rep. by its
   Commissioner and Secretary
   Department of Transport,
   Fort St. George, Chennai - 600 009.

2. Metro Transport Corporation Ltd.,
   Rep. by its Managing Director
   Pallavan Salai, Chennai - 600 002. .. Respondents

Prayer : Writ petition is filed under Article 226 of the Constitution of India praying for issuance of a writ of certiorarified mandamus calling for the records relating to memo 25025/Pa.P(Ni)3/PTC/96, dated 10.01.1997 on the file of the second respondent and quash the same directing the first and second respondent to give the petitioner all outstanding benefits due to the family of the deceased Muthukumaravelu and to one of the petitioner's son M.Rajesh, a suitable job in the second respondent Corporation according to his qualification.

For Petitioner : Mr.J.James for
Mr.K.R.Venkataraman

For Respondents: Mrs.C.K.Vishnupriya, GA
for R1
Mr.V.R.Kamalanathan for R2

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O R D E R

Prayer in the writ petition is to issue a writ of certiorarified mandamus calling for the records relating to memo 25025/Pa.P(Ni)3/PTC/96, dated 10.01.1997 on the file of the second respondent and quash the same directing the first and second respondent to give the petitioner all outstanding benefits due to the family of the deceased Muthukumaravelu and a suitable job to one of the petitioner's son M.Rajesh, in the second respondent Corporation according to his qualification.

2. The brief facts necessary for the disposal of the writ petition as stated in the affidavit is that the petitioner is the wife of R.Muthukumaravelu, who has put in 30 years of service and he was found missing since 18.05.1987. At that time, he was working as Time Keeper / Checking Inspector (Staff No.TK/CI.1028). She gave a police complaint about the missing of her husband in P.3.Police Station, Ottery. The police has also issued a Certificate on 17.09.1988, stating that man missing case registered in Cr.No.490/87 was investigated, and in spite of taking efforts, he could not be traced and there is no clue to trace him.

3. The petitioner is the wife of the said Muthukumaravelu and the following are the sons and daughters of the petitioner and the said Muthukumaravelu

S.No.	Name of the persons	Age	Relationship
1.	Thiru.Mohankumar	22 years	Son / unmarried
2.	Tmt.Rajathi	20 years	Daughter/married
3.	Selvan.Muralikumar	16 years	Son / Minor
4.	Selvan Rajesh	12 years	Son / Minor
5.	Selvan Rameshkannan	10 years	Son / Minor

4. In.G.O.Ms.478, Finance (Pension) Department, dated 04.06.1987, the Government ordered that under Section 108 of the Indian Evidence Act, the dependants of the person who are presumed to be dead, are entitled to all terminal benefits, including pension, although he died in harness.

> " 3. Government have carefully examined the decision of the Government of India and have decided to extend similar benefits to Tamil Nadu Government Servants including the staff of local bodies and aided educational institutions. They accordingly direct that :

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i) When an employee disappeared having his family, the family can be paid in the first instance the amount of salary due, leave encashment due and the amount of General Provident Fund, having regard to the nomination made by the employee.

ii) After the elapse of a period of one year, other benefits both Death-cum-Retirement gratuity / Family pension may also be granted to the family.

4. The above benefits may be sanctioned by the administrative department of Secretariat after observing the following formalities;

i)The family must ledge a report with the concerned police station and obtain a report that the employee has not been traced after all efforts had been made by the police.

ii) An Indemnity Bond should be taken from the nominee / dependants of the employees that all payments will be adjusted against the payments due to the employee in case he appears on the secure and makes any claim.

5. The Government also direct that in case the disbursement Death-cum-Retirement Gratuity is not effected within 3 months from the date of application, the interest shall be paid at the rates applicable and responsibility for the delay fixed."

According to the petitioner, she is entitled to get Provident Fund, Gratuity, Death-cum-Retirement Gratuity and Family Pension as per the said Government Order. Apart from that a lumpsum amount is also payable under G.O.Ms.48, Finance (Pension) Department, dated 22.01.1991. It is also claimed that one of the dependants of the deceased is also entitled to get appointment on compassionate ground, as if the person is dead while in service. For claiming appointment, to one of the son of the petitioner M.Rajesh, petitioner also submitted a representation. According to the petitioner, except the payment of Gratuity of Rs.9143/-, the second respondent has not paid other benefits till date and also not considered the appointment of the son, namely M.Rajesh on compassionate ground.

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5. The learned counsel also pointed out that through G.O.4(D) No.17, Labour and Employment (D1) Department, dated 08.05.1996, one R.Bhuvaneswari, D/o.S.N.Radhakrishnan, (Record Clerk of Tiruvalluvar Employment Exchange, who was found missing from 31.05.1983) was given appointment on compassionate ground presuming that the said employee was dead. Since the petitioner's claim was not considered by the second respondent, this writ petition is filed.

6. The second respondent filed counter affidavit and stated that the petitioner's husband Muthukumaravelu was appointed as Conductor in the year 1963 and brought on regular service from 01.01.1964 and the petitioner's husband was absented from duty from 19.05.1987, without sending any intimation, nor obtaining prior sanction of leave. No family member of Muthukumaravelu also informed anything with regard to the absence of the said Muthukumaravelu. Since the petitioner's husband continuously absented from 19.05.1987 for more than a year, and no information having been received from his family members, the name of the said Muthukumaravelu was removed from the roll of the second respondent by order dated 03.12.1987 with effect from 19.05.1987, the date on which the said Muthukumaravelu absented. In the counter affidavit, it is admitted that the petitioner lodged a complaint before the Sub-Inspector of Police, Ottery Police Station on 11.06.1987, stating that the petitioner's husband was missing from 19.05.1987 and consequently, Sub-Inspector of Police issued a Non-traceable Certificate on 17.09.1988. The contention of the second respondent in the counter affidavit is that since the Certificate was issued by the police only on 17.09.1988, the order of termination, removing the said Muthukumaravelu, dated 03.12.1987 is valid. The petitioner being the wife of the terminated employee is not entitled to get any benefit except the gratuity, which has already been paid.

7. The learned counsel for the petitioner submits that the petitioner's husband was missing from 19.05.1987 and after thorough search of his whereabouts, she made a complaint before the Ottery Police Station on 11.06.1987 and after investigation, the Sub-Inspector of Police issued a Certificate on 17.09.1988, stating that the petitioner's husband Muthukumaravelu, missing from 18.05.1987 was not traceable.

8. In view of the Certificate issued by the Sub-Inspector of Police, Ottery Police Station and having regard to the fact that the complaint given to the police on 11.06.1987, stating that the petitioner's husband was missing from 19.05.1987, the petitioner's husband cannot be treated as absentee. The reason for his absence is that he was not available for reporting to duty.

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9. In the said statements and in the light of the Certificate issued by the Sub-Inspector of Police, the petitioner's husband is not bound to be treated as a deserter and on that ground, his services cannot be terminated or his name removed from the roll on the ground of desertion. The desertion alleged by the second respondent on 19.05.1987, based on which the petitioner's husband's name was removed from the roll by an Order dated 03.12.1987 cannot be sustained. It is not the case of the second respondent that the petitioner's husband was found subsequently, to show that he willfully absented from duty.

10. The learned counsel for the petitioner further submits that in the Government Order issued in G.O.Ms.478, Finance (Pension) Department, dated 04.06.1987, the Government ordered that under Section 108 of the Indian Evidence Act, a person is not to be heard for seven years, he is presumed to be dead and the benefits payable to the said person, shall be paid to his dependants. In fact, the second respondent, by order dated 22.09.1990, sanctioned the Gratuity amount to the petitioner, who is the legal heir of the said Muthukumaravelu. In G.O.Ms.48, Finance (Pension) Department, dated 22.01.1991, the Government ordered to pay the benefits to the eligible family members.

11. The learned counsel for the petitioner also produced G.O.4 (D) No.17, Labour and Employment (D1) Department, dated 08.05.1996, wherein the Government sanctioned retirement benefits of a Government Employee by name Radhakrishnan and granted appointment to one of his daughter on compassionate ground, taking note of Section 108 of the Indian Evidence Act, that is the presumptive death of the person, who was not heard for 7 years.

12. Heard Mr.V.R.Kamalanathan, learned counsel for the second respondent. The learned counsel submitted that the petitioner's husbands name was already removed from the roll of the Corporation on 03.10.1987 and his name having been removed from the roll, the petitioner's legal heirs are not entitled to get any benefits. He also cited a judgment reported in (2004) 10 SCC 131 (LIC of India V. Anuradha) and contented that the petitioner must prove that her husband was dead, by filing a civil suit.

13. I have considered the submissions made by the learned counsel for the petitioner as well as the learned counsel for the second respondent.

14. Petitioner's husband is missing from 19.05.1987 and the petitioner had given a complaint before the police and the police also issued a certificate stating that the petitioner's husband was not traceable. The petitioner applied for retirement benefits of

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her husband and for appointment of her son on compassionate ground after the expiry of 7 years. At this juncture, it is relevant to refer Section 108 of the Indian Evidence Act, which reads as under:

> " 108. Burden of proving that person is alive who has not been heard of for seven years – Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

Here the petitioner has proved that her husband could not be traced for 7 years from 19.05.1987. The second respondent is also not in a position to state that the petitioner's husband is alive. The only objection raised is that the petitioner should file a civil suit and establish that the petitioner's husband is not alive.

15. The judgment cited by the learned counsel for the second respondent, even though is dealing with Section 108 of the Indian Evidence Act, the issue involved in that case is for claiming the Insurance benefits, where one has to prove the date and time of the death of the person. It is to be noted that for claiming the Insurance, one has to establish the date and time of death of the person, whether there was valid policy, etc. In such context, the Honourable Supreme Court was of the view that for claiming Insurance benefits, the date and time of the death should be proved. Paragraph 12 of the judgment can be usefully referred to, which is extracted here under :

> " 12.Neither Section 108 of the Evidence Act nor logic, reason or sense permit a presumption or assumption being drawn or made that the person not heard of for seven years was dead on the date of his disappearance or soon after the date and time on which he was last seen. The only inference permissible to be drawn and based on the presumption is that the man was dead at the time when the question arose subject to a period of seven years' absence and being unheard of having elapsed before that time. The presumption stands unrebutted for failure of the contesting party to prove that such man was alive either on the date on which the dispute arose or at any time before that so as to break the period of seven years counted backwards from the date on which the question arose for determination. At what point of time the person was dead is not a matter of presumption but of evidence, factual or circumstantial, and the onus of proving that

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> the death had taken place at any given point of time or date since the disappearance or within the period of seven years lies on the person who stakes the claim, the establishment of which will depend on proof of the date or time of death."

16. In the said Judgment, Honourable Supreme Court held that the death of the person may be presumed, but the date and the time of the death cannot be presumed and the same should be proved before the Civil Court. Therefore, the said judgment cited by the learned counsel for the second respondent has no application to the facts in this case.

17. Here the petitioner has established that the petitioner's husband has not been heard for over 7 years from 19.05.1987 and the same is not disputed and therefore, it is to be presumed that the petitioner's husband is dead as per Section 108 of Indian Evidence Act.

18. In view of the said finding, the action of the second respondent in removing the name of the petitioner's husband from the roll of the Corporation is illegal, since the petitioner's husband cannot be treated as an absentee. As he was not available, he could not report for duty. The contention of the second respondent that the petitioner's husband having been removed from the roll, the petitioner is not entitled to get retirement benefits and her son cannot be given compassionate appointment are unsustainable.

19. The petitioner's husband having been presumed to be dead on 19.05.1987, the second respondent is bound to sanction the retirement benefits and other benefits, which are legally available to the person who die while in service. The claim of petitioner's son namely, Rajesh, for compassionate appointment is bound to be considered by the second respondent as per the rules. The petitioner is entitled to get sanction of pension and other benefits, as her husband is to be treated as dead from 19.05.1987.

20. The second respondent is directed to calculate the retirement benefits and other benefits, and pay the same to the petitioner, within 8 weeks from the date of receipt of a copy of this order.

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With the above direction, the writ petition is ordered. No costs.

tsvn

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Commissioner and Secretary
   Department of Transport,
   Fort St. George, Chennai - 600 009.

2. The Managing Director
   Metro Transport Corporation Ltd.,
   Pallavan Salai, Chennai - 600 002.

+ 1 cc to Mr.V.R. Kamalanathan, Advocate SR No.27858

+ 1 cc to Mr. Arul Raj, J. James, Advocate SR No.27936

+ 1 cc to the Government Pleader SR No.27996

PV(CO)
SR/11.7.2006

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